

No. 12,803

---

**In the United States Court of Appeals  
for the Ninth Circuit**

---

**FRED C. HALL, PETITIONER**

**v.**

**COMMISSIONER OF INTERNAL REVENUE, RESPONDENT**

---

**ON PETITION FOR REVIEW OF THE DECISION OF THE TAX  
COURT OF THE UNITED STATES**

---

**BRIEF FOR THE RESPONDENT**

---

**THERON LAMAR CAUDLE,**  
*Assistant Attorney General.*

**ELLIS N. SLACK,  
ROBERT N. ANDERSON,  
GEORGE D. WEBSTER,**

*Special Assistants to the Attorney General.*

---

FILED

MAY 15 1934

U.S. DEPT. OF JUSTICE

CERT.



# INDEX

	Page
Opinion below .....	1
Jurisdiction .....	1
Question presented .....	2
Statute and regulations involved .....	2
Statement .....	2
Summary of argument .....	6

## Argument:

The Tax Court correctly held that the value of the shares of stock was includible in taxpayer's income in 1943 and 1944 at the time when he received them unconditionally rather than in 1942 when they were issued in his name.....	7
A. The applicable principles of law.....	7
B. The conclusion of the Tax Court that the shares of stock constituted income to the taxpayer in 1943 and 1944 is not only not clearly erroneous but is abundantly supported by the record.....	10
Conclusion .....	15
Appendix .....	16

## CITATIONS

### Cases:

<i>Adams v. Commissioner</i> , 20 B.T.A. 243, affirmed, 54 F. 2d 228 .....	10
<i>Aramo-Stiftung v. Commissioner</i> , 172 F. 2d 896.....	9
<i>Avery v. Commissioner</i> , 292 U. S. 210.....	10
<i>Bassett v. Commissioner</i> , 33 B.T.A. 182, affirmed per curiam, 90 F. 2d 1004.....	14
<i>Big Lake Oil Co. v. Commissioner</i> , 95 F. 2d 573, certiorari denied, 307 U. S. 638 .....	13
<i>Burnet v. Sanford &amp; Brooks Co.</i> , 282 U. S. 359.....	7
<i>Commissioner v. Scatena</i> , 85 F. 2d 729.....	10
<i>Commissioner v. Tyler</i> , 72 F. 2d 950.....	14
<i>Gullett v. Commissioner</i> , 31 B.T.A. 1067.....	9
<i>Haberman v. Commissioner</i> , 79 F. 2d 995.....	14
<i>Hedrick v. Commissioner</i> , 154 F. 2d 90, certiorari denied, 329 U. S. 719 .....	9
<i>Hudson Motor Car Co. v. United States</i> , 3 F. Supp. 834.....	11
<i>International Mortgage &amp; Investment Corp. v. Commissioner</i> , 36 B.T.A. 187 .....	10
<i>Lavery v. Commissioner</i> , 158 F. 2d 859.....	14
<i>McArdle v. Commissioner</i> , 11 T. C. 961.....	13
<i>Northern Trust Co. v. Commissioner</i> , 8 B.T.A. 685.....	9
<i>Old Colony Trust Co. v. Commissioner</i> , 22 B.T.A. 1062.....	9
<i>Old Colony Trust Co. v. Commissioner</i> , 59 F. 2d 168.....	10

## Cases—Continued

	Page
<i>Olson v. Commissioner</i> , 67 F. 2d 726, certiorari denied, 292 U. S. 637 .....	10
<i>Propper v. Commissioner</i> , 89 F. 2d 617.....	10
<i>Stoner v. Commissioner</i> , 79 F. 2d 75, certiorari denied, 307 U. S. 611.....	14
<i>United States v. Gypsum Co.</i> , 333 U. S. 364.....	11
<i>United States Steel Corp. v. Commissioner</i> , 2 T. C. 430.....	11

## Statutes:

## Internal Revenue Code:

Sec. 22 (26 U.S.C. 1946 ed., Sec. 22) .....	16
Sec. 42 (26 U.S.C. 1946 ed., Sec. 42) .....	8, 16

## Miscellaneous:

Effect, The, of Escrow Arrangements on Federal Income Tax Liability, 59 Harv. L. Rev. 1292 (1946).....	14
Page's Ohio General Code, Sec. 8623-22.....	12
Treasury Regulations 111, Sec. 29.42-2.....	8, 16

**In the United States Court of Appeals  
for the Ninth Circuit**

---

No. 12,803

FRED C. HALL, PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

---

*ON PETITION FOR REVIEW OF THE DECISION OF THE TAX  
COURT OF THE UNITED STATES*

---

**BRIEF FOR THE RESPONDENT**

---

**OPINION BELOW**

The findings of fact and opinion of the Tax Court (R. 33-50) are reported at 15 T. C. 195.

**JURISDICTION**

This petition for review (R. 52-58) involves federal income taxes for 1943 and 1944. On October 26, 1948, the Commissioner of Internal Revenue mailed to the taxpayer notice of a deficiency in the total amount of \$1,567.63. (R. 5.) Within ninety days thereafter and on November 23, 1948, the taxpayer filed a petition with the Tax Court for a redetermination of that deficiency under the provisions of Section 272 of the Internal Revenue Code. (R. 5-8.) The decision of the Tax Court sus-

taining the deficiency was entered August 31, 1950. (R. 51.) The case is brought to this Court by a petition for review filed November 24, 1950 (R. 58-59), pursuant to the provisions of Section 1141 (a) of the Internal Revenue Code, as amended by Section 36 of the Act of June 25, 1948.

#### QUESTION PRESENTED

Whether the Tax Court correctly determined that taxpayer is taxable in 1943 and 1944 on the value of shares of stock delivered to him in those years upon his performance of personal services pursuant to an executory contract rather than in 1942 when the shares were issued in his name.

#### STATUTE AND REGULATIONS INVOLVED

The applicable provisions of the statute and Regulations involved are set forth in the Appendix, *infra*.

#### STATEMENT

Insofar as pertinent to the issue here involved the facts as found by the Tax Court (R. 35-40) are as follows:

Taxpayer was a resident of Cleveland, Ohio, from 1936 to 1945. During the years in question, he reported his income on the cash receipts and disbursement basis. From 1936 to November, 1942, he was employed by the American Coach and Body Company in Cleveland. Prior to leaving the company in November 1942, he was the manager of its jig and fixture division. (R. 35.)

In November, 1942, the Ohio Aircraft Fixture Company (hereinafter referred to as "Company") was incorporated under the laws of Ohio for the purpose of acquiring and operating the jig and fixture division of the American Coach and Body Company. The Company was organized by taxpayer and three associates,



Warnsman, Fortney, and Wilson. Taxpayer purchased one share of stock from the Company at this time, and each of the other three organizers purchased ten shares of stock. The price paid for the stock was \$100 per share. The \$3,100 thus raised was adequate working capital for the needs of the Company which was organized to take over and operate a business which had valuable war production contracts and other assets sufficient for its operations. (R. 35.)

The purchase of the jig and fixture division was consummated in November, 1942, and the Company thereby acquired, on very lenient terms, a going concern, including its personnel, equipment, and valuable war production contracts. (R. 35-36.)

On November 25, 1942, taxpayer entered into an employment contract with the Company. This contract provided (36-38):

### *Employment Contract*

\* \* \* \* \*

The Parties hereto mutually agree as follows:

1. That the First Party [the Company] hereby hires the Second Party [petitioner] and the Second Party agrees to work for First Party in the capacity of Manager of the Service Engineering Department, in charge and responsible for all sales and advertising, formulating and figuring all selling prices in co-operation with the shop engineering and cost departments and to assist the factory manager in scheduling and planning production in First Party's business of general manufacturing, particularly aircraft, jigs and fixtures for a period of two (2) years, commencing on the 15th day of November, 1942 and ending on the 14th day of November, 1944.

2. Said Second Party shall at all times during such term of employment give his full attendance

and to his best endeavors and to the utmost of his skill and abilities exert himself for the profit, benefit and advantage of said business and perform such duties in said capacities as shall be required of him from time to time by First Party.

3. First Party shall pay the Second Party for his services hereunder as salary and compensation at the rate of One Hundred and Twenty-five (\$125.00) per week in addition to ten per cent (10%) of the profits over \$5,000.00 before Federal Taxes and after providing for all known reserves for contingencies; of the salary \$100.00 is to be paid in cash each week, \$25.00 and the said ten per cent, at the option of the Directors of the Company, may be paid in cash or in stock of the Company and shall be payable on or before January 15th of each year and shall cover the preceding year.

4. It is agreed by and between the parties that in case of illness, the base salary shall continue at full rate for six (6) months, half rate for a consecutive six (6) months and quarter rate for the balance of the term of the contract in excess of two six months periods, the additional salary, if any remaining the same. First Party through its Board of Directors, if it deems advisable, may demand Certificate of Inability to perform on account of illness from one or more reputable physicians.

5. First Party shall issue fifty (50) shares of stock of the Company in consideration of the signing of this employment contract and to carry out certain contracts necessary in the prosecution of the war. Two certificates are to be issued. Each to be for twenty-five shares and endorsed in blank. They are to be deposited with the Treasurer of the Company for the faithful performance of his contract. One certificate for twenty-five shares to be delivered on December 1, 1943, and the other certificate for twenty-five shares to be delivered on December 1, 1944, on the order of the Board of Directors.



6. Second Party agrees that during the life of this contract he will not engage in any manner either directly or indirectly engage [sic] in any other gainful occupation without consent of the Board of Directors; and shall further be directly responsible to the Board of Directors of the Company for the operation of his departments and said Directors shall from time to time determine the operating policies of these departments.

7. It is agreed by and between the parties that this contract will be considered performed on death of the Second Party.

Each of the other three organizers entered into similar employment contracts with the Company. (R. 38.)

Pursuant to the employment contract, two stock certificates, each representing 25 shares of no-par value stock, were issued in taxpayer's name in the latter part of 1942. He endorsed each stock certificate in blank and deposited it with the treasurer of the Company. Certificates representing fifty shares of stock similarly were issued in the names of each of the other three organizers who endorsed the certificates and deposited them with the treasurer of the Company. (R. 38.)

Prior to the issuance of the stock, the board of directors of the Company placed a value of \$100 per share upon each of the shares of no-par value stock, which represented the fair market value of each share. The total number of shares of stock originally issued by the Company was 231. Of this number, 200 shares were issued to the organizers upon their execution of the employment contracts, and 31 were issued to the organizers upon the payment of \$100 per share. (R. 38-39.)

Taxpayer began work for the Company on November 15, 1942. During 1943 taxpayer received \$6,500 as his base salary from the Company for his services as manager of its service engineering department, and addi-

tional compensation of \$3,515 as his share of the profits above \$5,000. In December 1943, one of the stock certificates representing 25 shares of stock which had been issued in taxpayer's name was delivered to him by the treasurer of the Company on the order of the board of directors. (R. 39.)

During 1944 taxpayer received \$6,500 as his base salary from the Company and additional compensation of \$3,290 as his share of the profits above \$5,000. In December, 1944, the second stock certificate representing 25 shares of stock which had been issued in taxpayer's name was delivered to him by the treasurer of the Company on the order of the board of directors. (R. 39.)

In September, 1945, taxpayer severed his connection with the Company and sold his shares of stock for \$150 per share. (R. 39.)

On the basis of the foregoing, the Tax Court concluded (R. 40) that the taxpayer became the unrestricted owner of 25 shares in 1943 and the other 25 shares in 1944, and hence was taxable on their value in those years, rather than in 1942 when the shares were issued in taxpayer's name.

#### SUMMARY OF ARGUMENT

The taxpayer in the instant case, pursuant to an employment contract, received for the first time without restriction 25 shares of stock in 1943 and 25 in 1944. It is the Commissioner's contention that the fair market value of these shares constituted income to the taxpayer in those years rather than in 1942 when the shares were endorsed by him and deposited with the treasurer of the Company. The Tax Court so held, and its finding is not only not clearly erroneous but is abundantly supported by the record.

Prior to their receipt in 1943 and 1944, the taxpayer

could not sell these shares, nor transfer them in any way. There is no showing by the taxpayer, upon whom is the burden of proof, as to whether dividends were paid on the shares or as to who voted the shares. Actually, on the record presented to this Court, there is no showing that the taxpayer exercised any control over the deposited stock; hence, the Commissioner's determination should not be overturned.

Moreover, the taxpayer's contention that the mere signing of the employment contract was sufficient consideration for the transfer of the shares is contrary to the laws of Ohio, under which they were issued. Further, it should be emphasized that the mere fact of signing the employment contract had no value as such; it was the rendition of services for which the contract was made.

If the taxpayer had received the shares outright in 1942 there would be no problem. The instant proceeding has arisen only because the taxpayer did not receive the shares in 1942 unrestricted and subject to his control; he so received them in the later years and that is when the tax should be assessed.

#### ARGUMENT

**The Tax Court Correctly Held That the Value of the Shares of Stock Was Includible in Taxpayer's Income in 1943 and 1944 at the Time When He Received Them Unconditionally Rather Than in 1942 When They Were Issued in His Name**

##### *A. The applicable principles of law*

Since the nature of income is fluid, not static, the imposition of an income tax requires that points of time be fixed between which it is to be measured for taxation purposes. Hence, as the Supreme Court said in *Burnet v. Sanford & Brooks Co.*, 282 U. S. 359, 363:

All the revenue acts which have been enacted since the adoption of the Sixteenth Amendment

have uniformly assessed the tax on the basis of annual returns showing the net result of all the taxpayer's transactions during a fixed accounting period, either the calendar year, or, at the option of the taxpayer, the particular fiscal year which he may adopt.

By this means the Government is assured of payments at regular intervals necessary for its support and only by such a system is the income tax capable of practical administration, for, as the Court further said in the cited case (p. 365):

The Sixteenth Amendment was adopted to enable the government to raise revenue by taxation. It is the essence of any system of taxation that it should produce revenue ascertainable, and payable to the government, at regular intervals. Only by such a system is it practicable to produce a regular flow of income and apply methods of accounting, assessment, and collection capable of practical operation.

Thus, Section 42 of the Internal Revenue Code, Appendix, *infra*, sets forth the general rule that income for the purposes of the federal tax is to be included within the year in which it is received by the taxpayer, unless he reports his income by an accounting system other than the cash basis. Cash basis taxpayers are considered to be taxable as of the date of realization of income. This means that the taxable occurrence is the receipt of cash or its equivalent.

Working in mitigation of the requirement of actual receipt for tax liability on the cash basis is the doctrine of constructive receipt. This principle, rooted in Treasury Regulations 111, Section 29.42-2, Appendix, *infra*, treats as taxable any sum which is subject to the unqualified command of the taxpayer, regardless of the fact that it has not fallen into his physical possession.



However, in order that an amount be recognized as constructively received it must be clear that there is no restriction upon the crediting of the taxpayer; availability must be unhampered. *Old Colony Trust Co. v. Commissioner*, 22 B. T. A. 1062. This is exemplified in the rule in compensation cases that the doctrine will not be invoked unless the employer is solvent. *Northern Trust Co. v. Commissioner*, 8 B. T. A. 685.

This doctrine is applied in special circumstances.<sup>1</sup> But its application is limited to situations where the money or property was available to the taxpayer without restriction and the failure to receive it resulted from the exercise of his own choice under circumstances where he had control of the right to receive the income in a certain year. *Aramo-Stiftung v. Commissioner*, 172 F. 2d 896 (C. A. 2d); *Hedrick v. Commissioner*, 154 F. 2d 90 (C. A. 2d), certiorari denied, 329 U. S. 719. In general it may be said income should not be construed to have been received prior to the date of actual receipt except where a taxpayer turns his back upon income or does not choose to receive income which he could have if he chose.

As the Tax Court stated in *Gullett v. Commissioner*, 31 B.T.A. 1067 (Acquiescence, XIV-1 Cum. Bull 9 (1935)) (p. 1069):

From the decisions in cases previously arising upon this issue, \* \* \* the principles to be applied in deciding the case at bar upon its own facts have been established. It is clear that the doctrine of constructive receipt is to be sparingly used; that amounts due from a corporation but unpaid, are not to be included in the income of an indi-

---

<sup>1</sup> Taxpayer argues (Br. 24) that the doctrine of constructive receipt is not involved herein, but actual receipt. The important factor, however, in either case is whether or not restrictions prevent a receipt of any kind. The same factors preventing actual receipt prevent constructive receipt.



vidual reporting his income on a cash receipts basis unless it appears that the money was available to him, that the corporation was able and ready to pay him, that his right to receive was not restricted, and that his failure to receive resulted from exercise of his own choice.

Choses in action that have a readily realizable market value are generally included as income for the year in which received. *Old Colony Trust Co. v. Commissioner*, 59 F. 2d 168 (C. A. 1st); *Commissioner v. Scatena*, 85 F. 2d 729 (C. A. 9th). However, shares of stock received as payment for services, subject to the qualification that they be held and not transferred for a stated period, are not income until the end of that period. *Propper v. Commissioner*, 89 F. 2d 617 (C. A. 2d). Nor are blocked marks collected in Germany but incapable of being cashed outside that country taxable income (*International Mortgage & Investment Corp. v. Commissioner*, 36 B.T.A. 187), or shares of stock credited each to an employee to become unconditionally his at the end of five years' service (*Olson v. Commissioner*, 67 F. 2d 726 (C. A. 7th), certiorari denied, 292 U. S. 637) income until the end of that period.

Whether or not there had been a constructive receipt is essentially a question of fact. *Avery v. Commissioner*, 292 U. S. 210; *Adams v. Commissioner*, 20 B.T.A. 243, affirmed, 54 F. 2d 228 (C. A. 1st).

B. *The conclusion of the Tax Court that the shares of stock constituted income to the taxpayer in 1943 and 1944 is not only not clearly erroneous but is abundantly supported by the record*

In the instant case, the taxpayer in 1942 made a contract of employment with the new corporation whereby 50 shares of its stock were to be provisionally issued to

him. (R. 36-38.) By the express proviso of the contract, the shares were not to be issued to the taxpayer absolutely but were to be issued to him and immediately endorsed in blank and given to the treasurer of the corporation, by whom they were to be held until December 1943 and December 1944, when upon order of the board of directors they were to be delivered to him. (R. 37-38.) The 1942 issuance was expressly stated to be only provisional. (R. 37-38.) He was to have no control over the shares while they were held by the treasurer. Indeed, his own understanding of the purpose of the arrangement was frankly stated to be that the corporation would itself be able to realize on them in event of his default on his employment. (R. 25-26.) On the basis of these facts the Tax Court held (R. 50) that the fair market value of the shares of stock was income to the taxpayer at the time (1943 and 1944) that they were made subject to his unfettered command and control.<sup>2</sup> This conclusion should stand unless it is "clearly erroneous." *United States v. Gypsum Co.*, 333 U. S. 364, 395.

Initially it should be noted that the taxpayer, upon whom was the burden of proof, failed to adduce several items of evidence at the Tax Court trial which are relevant to a decision of the issue in this case. It is not shown in the evidence as to whether or not dividends were ever declared by the Ohio Aircraft Fixture Company, and if so, whether these shares, being treasury

---

<sup>2</sup> This situation is to be compared to a sale in form only to an employee. If it is shown that the parties never intended the employee to furnish any part of the purchase price of the stock from his own funds, the company is entitled to a deduction equal to the market value of the stock determined as of the date the stock is transferred to the employee as the employee's property, i.e., the time of the final delivery to the employee. See *Hudson Motor Car Co. v. United States*, 3 F. Supp. 834 (C. Cls.); *United States Steel Corp. v. Commissioner*, 2 T. C. 430.

shares, were treated differently from the other shares. Neither is it shown as to whether or not any of the shares in question were ever voted, and if so, by whom. This is significantly lacking in the record.

There was no delivery of the certificates to the taxpayer to suffice for purposes of the income tax. He only endorsed them and handed them back to the Company, until such time as the Company had agreed to turn them over to his control. He could not transfer them; he could not sell them. (R. 43.) As stated, *supra*, there is no evidence as to whether he could vote the shares or had the right to receive the dividends. In short, on this record it is manifest that the Tax Court was clearly justified in coming to the conclusion that these shares did not belong to the taxpayer until 1943 and 1944. Contrary to the argument of taxpayer (Br. 10), he could clearly resist a tax in the year in which such a provisional delivery was made, for he had in fact received nothing. His momentary holding of them for endorsement is not a receipt by him. The mere issuance by the corporation does not give him income any more than if the corporation had merely promised to issue the shares in later years; for by the provisional issuance he did not receive unfettered ownership and control.

Moreover, as pointed out by the Tax Court (R. 46-47), the taxpayer's contention that the mere signing of the contract was sufficient consideration for the transfer of the shares is contrary to the laws of Ohio. Section 8623-22, Page's Ohio General Code, states:

*Payment for shares.* \* \* \* shares shall be issued only \* \* \*, or for labor or services actually rendered to the corporation.

Thus, under the prevailing local statute, the taxpayer could not become the owner until the services had been

performed, which in the instant case was 1943 for the first 25 shares and 1944 for the other 25 shares.

Taxpayer contends (Br. 13-15) that paragraph Five of the Employment Contract shows that the shares of stock were transferred in consideration of the mere signing of the contract; it is alleged that these shares did not constitute additional compensation. However, the Tax Court, in dismissing this argument, stated (R. 46):

But the Company was contracting for petitioner's services, not for his promise. The bare promise without the services had no value. The services called for by the contract were not performed until 1943 and 1944, in each of which years a certificate for 25 shares was delivered to petitioner for the services which he had rendered.

Thus the facts herein clearly take the case out of the scope of actual receipt and the constructive receipt doctrine as far as the year 1942 is concerned. The shares were not set apart and subjected to taxpayer's unrestricted control in that year.

It should be emphasized that if these shares had been given to the taxpayer in 1942 with no restrictions, then this case would not have arisen. The problem is only presented because the taxpayer did not receive the shares—he had to endorse them and return them to the Company. Hence, it was the Company and not the taxpayer that had control of the shares. See *McArdle v. Commissioner*, 11 T. C. 961.

Other and more formal restrictive devices have caused similar tax postponement. Where the buyer retained or placed in escrow part of the compensation to guarantee himself against loss, that amount has been held not to be income to the seller until actually received. *Big Lake Oil Co. v. Commissioner*, 95 F. 2d 573 (C. A. 3d), certiorari denied, 307 U. S. 638. And in



*Stoner v. Commissioner*, 79 F. 2d 75 (C. A. 3d), certiorari denied, 307 U. S. 611, the seller, pursuant to agreement, deposited part of the consideration in trust pending final determination of tax liability on the purchased business, and was held to have received no income until the retained consideration was released. See *The Effect of Escrow Arrangements on Federal Income Tax Liability*, 59 Harv. L. Rev. 1292 (1945-1946);<sup>3</sup> *Lavery v. Commissioner*, 158 F. 2d 859 (C. A. 7th).

*Haberman v. Commissioner*, 79 F. 2d 995 (C. A. 2d), presents a more extreme situation than the instant case. In that case the taxpayer received fully issued and paid-up shares from the employer company as compensation, endorsed them, and then deposited them with the company to secure a loan for the full purchase price of the shares. He repaid the loan and received the shares. It was held that the taxpayer received the compensation as income in the years in which the stock was finally transferred to him.

Relative to his understanding of the provision of the employment contract that required him to endorse the certificates and return them to the treasurer of the Company, the taxpayer testified (R. 26):

The Witness: Well, I would believe that if I failed to perform under the contract, owing to the

---

<sup>3</sup> In the situation where the escrow agent is to deliver to the seller only after a certain date, the general principles are that the gain should be reported on ultimate receipt unless that receipt is so likely that the taxpayer may fairly be charged with an immediate, measurable economic benefit. The ultimate recipient's degree of control over the use of the deposited item and the receipt of interim income from it, of course weigh heavily in favor of immediate taxability. *Bassett v. Commissioner*, 33 B. T. A. 182, affirmed *per curiam*, 90 F. 2d 1004 (C. A. 2d). But where there is a definite statement that ultimate receipt must take place, if at all, in a subsequent taxable period, and the taxpayer neither receives interim income as it accrues nor has control of the deposited corpus, the argument for postponing taxability is much stronger. *Commissioner v. Tyler*, 72 F. 2d 950 (C. A. 3d).



responsibility that the company had to complete those contracts I would need to be replaced, and if there were expense or damages involved in replacing me or because I didn't complete the contract, those damages could be recovered from the value of the stock that they were holding that had been issued to me.

On the basis of this testimony the taxpayer seeks to argue (Br. 18-19) that these shares were merely on deposit with the Company. However, emphasis on this point is misplaced because as indicated by the cases, *supra*, if a deposit of any nature is as restricted as the one in the instant case, then it does not constitute income to the transferee.

#### CONCLUSION

The decision of the Tax Court is in accordance with law. It is not clearly erroneous but on the contrary is fully supported by the facts of record. Therefore it should be affirmed.

Respectfully submitted,

THERON LAMAR CAUDLE,  
*Assistant Attorney General.*  
 ELLIS N. SLACK,  
 ROBERT N. ANDERSON,  
 GEORGE D. WEBSTER,  
*Special Assistants to  
 the Attorney General.*

MAY, 1951.

## APPENDIX

## Internal Revenue Code:

## SEC. 22. GROSS INCOME.

(a) *General Definition*.—"Gross income" includes gains, profits, and income derived from salaries, wages, or compensation for personal service \* \* \* of whatever kind and in whatever form paid, or from professions, vocations, trades, businesses, commerce, or sales, or dealings in property, whether real or personal, growing out of the ownership or use of or interest in such property; also from interest, rent, dividends, securities, or the transaction of any business carried on for gain or profit, or gains or profits and income derived from any source whatever. \* \* \*

(26 U.S.C. 1946 ed., Sec. 22.)

SEC. 42 [as amended by Section 114 of the Revenue Act of 1941, c. 412, 55 Stat. 687, 697]. PERIOD IN WHICH ITEMS OF GROSS INCOME INCLUDED.

(a) *General Rule*.—The amount of all items of gross income shall be included in the gross income for the taxable year in which received by the taxpayer, unless, under methods of accounting permitted under section 41, any such amounts are to be properly accounted for as of a different period. \* \* \*

(26 U.S.C. 1946 ed., Sec. 42.)

Treasury Regulations 111, promulgated under the Internal Revenue Code:

SEC. 29.42-2. *Income Not Reduced to Possession*.—Income which is credited to the account of or set apart for a taxpayer and which may be drawn upon by him at any time is subject to tax for the year during which so credited or set apart, although not then actually reduced to possession. To constitute receipt in such a case the income must be credited or set apart to the taxpayer without

any substantial limitation or restriction as to the time or manner of payment or condition upon which payment is to be made, and must be made available to him so that it may be drawn at any time, and its receipt brought within his own control and disposition. A book entry, if made, should indicate an absolute transfer from one account to another. If a corporation contingently credits its employees with bonus stock, but the stock is not available to such employees until some future date, the mere crediting on the books of the corporation does not constitute receipt.

